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SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Day of general discussion: "The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (art. 15 (1) (c) of the Covenant)"

Protecting the rights of Aboriginal and Torres Strait Islander traditional knowledge

Background paper submitted by the Aboriginal and Torres Strait Islander Commission (Australia)

The Aboriginal and Torres Strait Islander Commission (ATSIC) is the peak body representing Aboriginal and Torres Strait Islander peoples in Australia. ATSIC is an independent statutory authority established by the Commonwealth Government under the Aboriginal and Torres Strait Islander Commission Act 1989 (the ATSIC Act).

ATSIC was designed to embody the principle of "self-determination" for indigenous Australians and to devolve decision-making activities in indigenous affairs to regional and community level. Through ATSIC's representative arm, Aboriginal and Torres Strait Islander people participate in the processes of government. Elected representatives are able to make decisions about projects, programmes and policies that affect their communities. At the national level, ATSIC's elected commissioners represent the views of indigenous communities from all parts of Australia.

1. Traditional knowledge is an important aspect of indigenous power and identity, which is often collectively owned, socially based and continually evolving. Indigenous peoples generally view the world in which we live as an integrated whole as our beliefs, knowledge, arts and other forms of cultural expression have been handed down through the generations.[1] Indigenous traditional knowledge encompasses not only arts-related cultural expressions, but also indigenous ecological and biological knowledge. Traditional knowledge about plants such as their location, habitats and their properties (e.g. medicinal value) is an increasingly valuable commodity, sought after by the pharmaceutical, agricultural and cosmetic industries. There is also a growing interest in "bush foods", an industry that draws heavily on indigenous peoples' knowledge about the uses of these foods.

2. Traditional knowledge is a protectable subject matter that should afford the holders of that knowledge the legal possibility of obtaining enforcement of their rights through conventional intellectual property systems. Indigenous peoples not only want the right to protect their traditional knowledge, but also the right to share in the economic benefits derived from that knowledge. Indigenous laws that govern the use and transmission of traditional knowledge at community level need formal recognition, as these internal regimes have been developed from repeated practices and are monitored and enforced by our elders and spiritual and community leaders.

3. Indigenous peoples' rights to traditional knowledge differ from conventional intellectual property rights in a number of important ways. These include:

(a) They are communal rights, often vested in clan, family or other socio-political groups;

(b) They cannot be readily associated with a single, identifiable individual creator, author or producer;

(c) They are managed and owned in accordance with customary rules and codes of practice, and are usually not sold or alienated in ways that conventional intellectual property rights can be;

(d) They include rights to all forms of traditional knowledge such as intangible cultural products and expressions, all of which are not protected under conventional intellectual property laws;

(e) Indigenous traditional knowledge is usually transmitted orally and is therefore not subject to the same requirements regarding material forms that pertain to conventional intellectual property systems.

Because of these significant differences, conventional intellectual property laws cannot provide adequately for the recognition and protection of traditional knowledge.

Terminology

4. In Australia, as in the international arena, there are ongoing debates about the appropriate terminology in regard to traditional knowledge. The United Nations Educational, Scientific and Cultural Organization (UNESCO) focuses on the term "expressions of folklore" which covers "the characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community".[2] Aboriginal and Torres Strait Islander people consider the term "folklore" to be inappropriate to denote indigenous cultures as it diminishes the importance of indigenous cultures as a living heritage.

5. The term "traditional knowledge" often refers only to ecological and biological knowledge including the management and conservation of such resources and the environment, all of which have economic, commercial as well as cultural value. However, it is becoming recognized that in the broad sense, traditional knowledge encompasses both ecological and biological knowledge as well as artistic and cultural expressions.

6. While traditional knowledge is the term used in this paper to cover both the tangible and intangible aspects of indigenous culture, it should be stated that in its policy deliberations, ATSIC has adopted the working definition "indigenous cultural and intellectual property". This term is based on the definition of "heritage" contained in the draft principles and guidelines for the protection of the heritage of indigenous peoples (E/CN.4/Sub.2/1994/31, annex) by Erica-Irene Daes, the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights and former Chairperson of the Working Group on Indigenous Populations. This definition includes all aspects of Aboriginal and Torres Strait Islander heritage such as:

(a) Literary, performing and artistic works (including songs, music, dances, stories, ceremonies, symbols, languages and designs);

(b) Languages;

(c) Scientific, agricultural, technical and ecological knowledge (including cultigens. medicines and the phenotypes of flora and fauna);

(d) Spiritual knowledge;

(e) All items of moveable cultural heritage;

(f) Indigenous ancestral remains;

(g) Indigenous human genetic material (including DNA and tissues);

(h) Immovable cultural property (including sacred and historically significant sites and burial grounds);

(i) Documentation of indigenous peoples' heritage in archives, film, photographs, videotape or audiotape and all forms of media.

This definition is intended to reflect indigenous peoples and cultures in a contemporary sphere and is based on our survival and consensus within our communities. As previously stated, for the purposes of this paper the term "traditional knowledge" will comprise the above working definition.

Protecting traditional knowledge in Australia

7. Aboriginal and Torres Strait Islander traditional knowledge has become a key focus of the Australian national identity and now represents a core part of what is distinctive about Australia. The interest in Aboriginal and Torres Strait Islander culture has been cited as a major reason for the growth of Australia's international tourism industry. It has been estimated that the indigenous arts and crafts market is worth $200 million per year and half of the sales relate to the tourism market.[3] The downside to the tourism market is the authenticity of products. Unfortunately, cultural symbols of Aboriginal and Torres Strait Islander peoples are often used without recognition of their source. Not surprisingly, there has been a growing concern among indigenous peoples that appropriation of indigenous culture by the wider community fails to benefit the communities that own the artistic and cultural symbols.[4]

8. Aboriginal and Torres Strait Islander peoples and their communities have grappled for many years to preserve our culture and to control the use and misappropriation of our traditional knowledge. The concerns expressed by Aboriginal and Torres Strait Islander peoples that have been highlighted over the past 30 years in various government reports and in the recent ATSIC publication, Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights (1998).

9. The publication is the outcome of ATSIC's process of consultation with Aboriginal and Torres Strait Islander peoples to develop an indigenous position on intellectual property. Our Culture, Our Future recommends possible solutions in three major areas: legislative solutions; administrative responses (policies, protocols and codes of ethics); education and awareness programmes for both indigenous peoples and the wider community. The report also focuses on the cultural disparities that exist within Australian society, particularly with regard to the different cultural concepts of "property" that exist between Aboriginal and Torres Strait Islander communities and the wider Australian community. An example is that indigenous peoples do not necessarily view their traditional knowledge in terms of "property" but in terms of community and individual responsibility.

10. Conventional intellectual property laws are designed to provide monopoly rights to creators and inventors, and to encourage economic and commercial growth. This system of laws, which includes patents, copyrights, plant breeders' rights, designs and trademarks, is being

increasingly challenged by new and emerging technologies. As previously stated, it is also being challenged by Aboriginal and Torres Strait Islander peoples as it is claimed that our traditional knowledge is not protected by current intellectual property laws. Some of the major issues and concerns are outlined below.

Copyright Act 1968

11. While Aboriginal and Torres Strait Islander peoples have the same rights as other Australians to protection under the Copyright Act, the law does not recognize other significant issues that are specific to Aboriginal and Torres Strait Islander peoples. This has been highlighted by a number of court cases that have attracted significant media attention in regard to copyright infringements. Consequently, the Copyright Act does not meet all the needs of indigenous Australians. This is particularly evident in the protection of traditional knowledge that has been passed down orally from generation to generation and is owned communally.

12. ATSIC believes there is an urgent need to address culturally specific issues in conventional intellectual property legislation. As previously stated, there have been a number of examples of copyright infringements. Some of them are:

> The late Wandjuk Marika, a prominent Aboriginal artist and Chairman of the Aboriginal Arts Board of the Australia Council, first raised the issue of copyright infringement in 1970. He was deeply offended by the unauthorized reproduction of his artwork depicting a special creation story belonging to his clan. The distorted and trivialized version of Mr. Marika's artwork was not only deeply hurtful to him but the securing of financial resources necessary to mount a legal challenge in order to seek redress was not available to him. He stated that while he was happy that people were interested in Australian Aboriginal culture, he would also request that artists and craftworkers have access to legal protection in order to prevent their works being copied or reproduced without their permission.[5]
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> In 1989, action was brought by John Bulun Bulun and 13 other Aboriginal artists to obtain compensation against a T-shirt design company called Flash Screenprinters for the unauthorized reproductions of their works on T-shirts. This case attracted considerable media attention. Injunctions and an out-of-court settlement of $150,000 were obtained in this matter.
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> A more recent reported case concerning the unauthorised copying of the designs of Aboriginal artists was Milpurrurru and Ors v. Indofurn Pty Ltd. This case concerned the importation by a Perth-based company of carpets manufactured in Viet Nam. On these carpets were the reproduced designs of George Milpurruru, Banduk Marika, Tim Payungka Tjapangati and five deceased Aboriginal artists. All the designs had been copied from a portfolio of artworks produced by the Australian National Gallery. The defendants in this case were obliged to pay substantial damages.

The souvenir industry produces reproductions, or purported reproductions of Aboriginal and Torres Strait Islander designs and other objects for the tourist market. Many of them are cheap items that convey an impression, often inaccurate, of Aboriginal and Torres Strait Islander influence. An example is in the manufacturing of didgeridoos where the cutting of the raw material, the stripping, curing and painting of the instrument are being dominated by non-indigenous people and marketed as "Aboriginal made" products.[6]

Non-indigenous artists and graphic designers are using indigenous designs and images in their artwork and passing off their work as "Aboriginal" styles. An example is the "X-Ray Koala" which contains the distinctive Rarrk style of artwork from Arnhemland in Northern Australia. This use of this distinctive style of artwork misleads the consumer into believing they are buying products from the Arnhemland region.[7]

A related issue is the appropriation of indigenous art styles, songs, stories and themes by both indigenous and non-indigenous artists who do not have the permission of the custodians of these images.

Limitations of the Copyright Act

13. Aboriginal and Torres Strait Islander peoples want to obtain protection for the stories, songs and dances that have been passed down orally from generation to generation. Under the current Copyright Act, protection is not accorded unless the stories, songs and dances are original and recorded in material form.[8] However, where a sound recording (e.g. tape or video recording) is made of a story, the person making the sound recording would be the copyright owner of that recording even though an Aboriginal or Torres Strait Islander community may believe the story belongs to their particular community.

14. In the event that the stories, songs and dances are recorded in material form, the Copyright Act does not protect them in perpetuity. This issue was outlined in the Our Culture, Our Future which stated, "[t]he period of copyright protection for artistic, musical, dramatic and literary works is generally the creator's life plus 50 years".[9] The concern is that Aboriginal and Torres Strait Islander arts and cultural expressions are culturally significant indefinitely. One of the major areas of concern is that the current Copyright Act does not protect images in rock paintings. The images in the rock paintings have been reproduced on a wide range of items. These paintings have been in existence since time immemorial and are culturally significant and an integral part of a particular clan's traditional knowledge. Unfortunately, these images are not accorded protection under the Copyright Act.[10]

15. Under the Copyright Act, the photographer owns copyrights on photographs unless the photograph is a commissioned portrait. The difficulty this poses for Aboriginal and Torres Strait Islander peoples is that they have no way of controlling photographic reproductions of themselves, their deceased family members and their sacred sites.[11]

16. Even when the Copyright Act does afford protection to Aboriginal and Torres Strait Islander peoples, there are often practical limitations inherent in the broader Australian legal system which prevent Aboriginal and Torres Strait Islander groups from benefiting from this

protection. Such practical limitations include a lack of knowledge about the legal rights that copyright may afford creators, lack of understanding of who is a copyright owner, unequal bargaining power and limited funding available to bring copyright infringement actions. Further, the area of copyright law is specialized, complex and expensive and therefore often not available to many indigenous peoples and communities. At the same time, it is acknowledged that test cases that have come before the courts such as Milpurrurru and Ors v. Indofurn Pty Ltd (1995) and Bulun Bulun v. R and T Textiles Pty Ltd (1998) have had the effect of highlighting complex issues in copyright infringement cases.[12]

Patents and traditional knowledge

17. The Australian Patents Act (1990) provides a monopoly right to an inventor of a product or a process. Aboriginal and Torres Strait Islander peoples have criticized the fact that the products and processes that are the subject of patent applications are in fact derived from, or based on indigenous peoples' traditional knowledge and innovations, a good example being knowledge of medicinal plants and natural food resources. The patenting of this knowledge and products denies the rights of indigenous peoples to any benefits.[13]

18. The nature of innovation and knowledge management in indigenous societies is not generally considered to be compatible with the requirements of the existing patent system. The patent system, as with other forms of intellectual property, confers ownership rights upon individuals and has as its primary objective the encouragement of economic and commercial growth. Indigenous traditional knowledge and innovations, by contrast, are transmitted over generations, mostly through our oral traditions. Indigenous innovation is thus a long-term process, and is managed according to a complex system of collective rights and interests.

19. The importance of plant products to pharmaceutical, cosmetics and agricultural companies has been of major concern to Aboriginal and Torres Strait Islander peoples. Further, the use of patents by pharmaceutical and research companies to protect their rights with respect to products and processes highlights issues of concern. The patenting of a product or processes derived from naturally occurring products which have been used by indigenous peoples and communities since time immemorial raises moral and ethical questions. For example, how was the knowledge about the product or process obtained, and to what extent did indigenous innovators and users of the products participate in the acquisition of the product and its patenting? Further, did this process involve indigenous knowledge and techniques? Importantly, were adequate provisions, through compensation, protection and benefit-sharing, made for recognizing the contribution of indigenous communities?[14] It is these important issues that need to be addressed in terms of protecting indigenous traditional knowledge.

International participation

20. Australia is signatory to the Convention on Biological Diversity. Article 8 (j) of the Convention recognizes indigenous peoples' involvement in developing, conserving and sustainably using the biological resources on our lands and territories for millennia.

21. ATSIC recently sent a delegation to the Fifth Conference of Parties (COP 5) to the Convention of Biological Diversity held in Nairobi in May 2000. Indigenous representatives had

direct input into the Convention processes and a direct bearing on the outcomes. The major outcomes included the adoption of a work plan for advancing awareness of the protection of indigenous traditional knowledge and recognition of the role of women in the conservation and sustainable use of natural resources. Indigenous peoples from Australia have generally been well represented at meetings and, because of continuity of attendance, provide considerable leadership at the international level when dealing with issues in regard to the Convention on Biological Diversity.

22. Attendance at international meetings has been a priority for ATSIC in the development of appropriate international standards that can influence the Australian Government to introduce relevant laws that are consistent with international standards. As previously stated, attendance at international meetings on the protection of traditional knowledge leads to increasing awareness and understanding of indigenous concerns. However, at the domestic level, there is the major concern that there is no guarantee that Aboriginal and Torres Strait Islander peoples will be included in government processes or will ultimately benefit. At the policy level, there is uncertainty regarding the nature and extent of indigenous interests and involvement.

Outstanding matters for the protection of traditional knowledge

23. ATSIC is interested in pursuing the issue of resale royalty rights for Aboriginal and Torres Strait Islander visual artists. Resale royalty is the right of an artist to claim a share of the proceeds of each successive resale of an original artwork. Resale royalty rights are protected in copyright law in other countries, notably in French law where is it recognized as droit de suite. The issue of resale royalty is particularly relevant to Aboriginal and Torres Strait Islander artists as recent recognition of their work, both in Australia and internationally, has led to the rapid increase in value of their work. In many cases, the benefits of this increase have been to purchasers and dealers rather than the artists themselves.[15]

24. Moral rights is another issue that is of interest to Aboriginal and Torres Strait Islander peoples. Moral rights are a legal concept that refers to an author's right to stop distortion or destruction of his/her work. While these rights are recognized in international law by which Australia is bound as a signatory to the Berne Convention, a Moral Rights Bill has only recently been introduced into the Australian Parliament. For Aboriginal and Torres Strait Islander peoples, the cultural integrity of any cultural reproductions is critical, as indigenous custodians are collectively responsible for ensuring that any reproductions comply with customary laws. Therefore, the recognition of moral rights within the Copyright Act is seen as a step towards protecting the cultural aspects embodied in traditional knowledge. However, ATSIC has emphasized that any proposed moral rights legislation should go beyond the issue of individual rights and address indigenous concerns, including the recognition of the communal rights of indigenous custodians.[16]

25. Owing to the limitations of the existing intellectual property laws, ATSIC believes that serious consideration must be given to the establishment of a sui generis (specific) legislative framework to protect indigenous traditional knowledge. In considering the development of sui generis approaches, ATSIC believes it is important to consider emerging international standards and indigenous statements, which provide a framework within which beneficial

sui generis systems could be introduced. Some of these include the draft United Nations declaration on the rights of indigenous peoples as well as the work pursued by UNESCO and the World Intellectual Property Organization (WIPO). Indigenous peoples' statements include:

The Mataatua Declaration (June 1993);

The Belem Declaration (1988);

The Julayinbul Statement (November 1993);

The Kari-Oca Declaration (May 1992).

26. The development of sui generis approaches need to be based on new forms of legislation that provide recognition and protection of indigenous forms of intellectual property. These include the recognition of particular features such as collective rights, benefit-sharing and communal forms of ownership.

Conclusion

27. Each year Aboriginal and Torres Strait Islander communities see more evidence of cultural appropriation and are therefore keen to gain some defensive control. The general lack of recognition and protection of traditional knowledge has become a major concern over the past 30 years for Aboriginal and Torres Strait Islander peoples. Despite the fact that there have been a number of Government Inquiries dealing with the issue of protecting indigenous traditional knowledge, very few changes have been implemented.

28. Despite this situation, there have recently been some measures put in place to protect the authenticity of indigenous-produced arts and cultural products. In November 1999, the National Indigenous Arts Advocacy Association Inc. launched the authenticity label to assist consumers to identify genuine Aboriginal and Torres Strait Islander arts and cultural products which in turn will benefit indigenous artists.

29. One of the concerns currently facing ATSIC in implementing the recommendations of Our Culture, Our Future has been the minimalist approach taken by the Australian Government. For example, government departments have consistently indicated that their mandate is limited to developing education and awareness strategies to promote greater awareness of indigenous intellectual property rights as well as reforms that can be achieved within a framework of existing intellectual property laws. While the development of reforms within existing intellectual property laws is critical to the achievement of better protection for indigenous traditional knowledge, additional initiatives such as sui generis systems must also be pursued.

30. The pace of reform as pursued by the Australian Government is likely to be relatively slow and, as previously stated, reforms are only likely to take place within existing legal frameworks. In the report Our Culture, Our Future, it is evident that indigenous peoples hold the

view that existing intellectual property laws do not go far enough in terms of providing for the recognition and protection of our communal rights to traditional knowledge. Indigenous peoples also want control over decision-making in relation to our traditional knowledge. In Australia, existing intellectual property laws are limited for the following reasons:

They emphasize economic rights over cultural rights;

They do not cover the range of issues that indigenous peoples consider as their traditional knowledge (e.g. oral stories, dance, etc. which are not in written form);

They only provide protection for defined periods of time and do not provide permanent protection.

31. Given these facts and the limitations of existing laws, ATSIC is committed to pursuing additional initiatives, including the consideration and development of sui generis legislation to cover all aspects of indigenous traditional knowledge.

32. The traditional knowledge of indigenous peoples provides the foundation of our personal identity and ancestral anchorage. It provides a distinctive world view that outsiders can rarely grasp. Indigenous rights to our traditional knowledge is part of the overall challenge to colonial paternalism and underlying systemic racism that is evident in the approaches to Aboriginal and Torres Strait Islander affairs.

33. Indigenous rights have yet to be given comprehensive definition in Australia and Aboriginal and Torres Strait Islander peoples have to be part of this process. Consequently, we need to guide the debates on how to protect our traditional knowledge. We need the protection and right to say no to commercialization, exploitation, misuse and abuse of our cultural resources. If we choose to commercialize, donate or share our knowledge, then our interests need to be protected and we must be compensated where exploitation has occurred.

Notes

[1] Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights, 1998, p. 2.

[2] WIPO, Roundtable on Intellectual Property and Traditional Knowledge (Geneva, 1 and 2 November 1999), document WIPO/IPTK/RT/99/2, para. 3.

[3] National Aboriginal and Torres Strait Islander Cultural Industry Strategy, ATSIC, 1997, p. 5.

[4] Proceedings of the Australian Reconciliation Convention, Book 1, 26-28 May 1997, Australian Government Publishing Service, Canberra, p. 73.

[5] Wandjuk Marika, Wandjuk Marika Life Story as told to Jennifer Isaacs (1995), University of Queensland Press, St. Lucia, p. 118.

[6] Our Culture, Our Future, p. 39.

[7] Ibid. p. 37.

[8] Ibid, p. 56; Australian Copyright Council Bulletin No. 75, p. 31.

[9] Our Culture, Our Future, p. 59.

[10] Ibid.

[11] Ibid. p. 56.

[12] Stopping the Ripoffs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples, 1994, p. 11.

[13] M. Davis, "Indigenous Rights in Traditional Knowledge and Biological Diversity: Approaches to Protection", Aboriginal and Islander Law Reporter, vol. 4, No. 4, November 1999, p. 18.

[14] Ibid. p. 22.

[15] Australian Copyright Council, 1992, p. 39.

[16] Our Culture, Our Future p. 55.